

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2123

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
BERNARD BERGMAN,

Petitioner-Appellant,

- against -

HONORABLE LOUIS J. LEFKOWITZ, New
York State Attorney General, the
Justices of the Supreme Court of the
State of New York, sitting in New York
Court of Appeals,

Respondents-Appellees.
-----X

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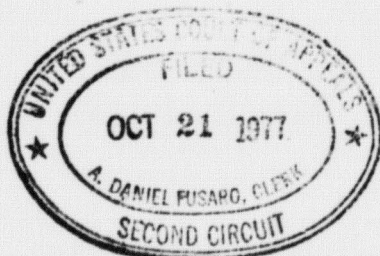
APPENDIX FOR PETITIONER-APPELLANT BERNARD BERGMAN

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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DOCKET ENTRIES

DIST/OFFICE	DOCKET YR. NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	R 23	\$	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR. NUMBER
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PLAINTIFFS

BERGMAN, Bernard

DEFENDANTS GOETTEL, J..

Hon: LOUIS J. LEFKOWITZ
Attorney General of the State of
New York
The Justices of the Supreme Court of
State of New York, Sitting in New York

CAUSE

petition for writ of habeas corpus

dd

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	JUL 8 1977	RECEIPT NUMBER	CARD DATE MAILED
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UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/75)

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DOCKET ENTRIES

77 CIV 3344

BERNARD BERGMAN -VS- LOU IS J. LEFKOWITZ

GOETTLE, J.

DATE	NR.	PROCEEDINGS
07-07-77	1	Filed petition for writ of habeas corpus
07-15-77	2	Filed Petitioner's affdvt. and Order to Show Cause with a stay. Ordered that the respondents show cause at 12 o'clock noon on 7-21-77 in Rm. 2764 why an order should not be made staying the surrender of the petitioner B. Bergman to the custody of the respondents, pending the hearing and determination of the petition for a writ of habeas corpus: and sufficient cause having been shown. Ordered that the surrender of the petitioner to the custody of the respondents is stayed pending the hearing of this motion; and personal service should be rendered by 7:00 o'clock in the afternoon of 7-11-77--Ward, J.
07-13-77	3-	Filed Respondent notice of appeal to the USCA for the Second Circuit from the order entered on 7-11-77. Mailed copies to Litman, Friedman and Kaufman
07-15-77	4-	Filed petitioner's memorandum in support of Order to Show Cause containing an interim stay.
07-21-77	----	Non-Jury trial begun before Judge Goettel
07-22-77		Trial Continued
08-2-77		Trial Continued and adj. to 8-8- , 9, 10, 12, 1977 and concluded decision reserved
08-26-77	5-	Filed true copy of USCA order to dismiss the appeal from the USD C for the S. Dist. for lack of jurisdiction is granted m/n
10-5-77	6	Filed Memo on N.Y. Law of the possible effect of the withdrawal of B. Bergman's plea of guilty to the state indictment.
10-5-77	7	Filed Petitioner's memo on the appropriate remedy that can be granted in the case at bar.
10-5-77	8	Filed Respondents' Reply Memo.
10-5-77	9	Filed Respondents' Post-Hearing Memo of Law.
10-5-77	10	Filed Petitioner's Post-Hearing memo on the petition for a w/h/c.
10-5-77	11	Filed Petitioner's Reply Brief.
10-5-77	12	Filed Memo in support of order to show cause containing an interim stay.
10-4-77	13	Filed OPINION # 46417-Petitioner seeks a Writ of habeas corpus staying his surrender to the N.Y.S. authorities and vacating a one-year prison sentence. Any application for a further stay of the state sentence or alternatively, for release on bail should be made to the Court of Appeals. The stay previously ordered pending this decision will be continued for five days from the date hereof to allow such application to be made. The petition for a w/h/c is in all respects denied..... So Ordered. Goettel, J. m/n..
10-5-77	14	Filed Petitioner's Notice of Appeal from the opinion rendered Oct 4, 1977 denying writ of h/c.
10-6-77	15	Filed Affdvt. of Arthur Weinstein in opposition to the petition of B. Bergman.
10-6-77	16	Filed Petitioner's Corrected Notice of Appeal from opinion denying a w/h/c dated 10-4-77. copies mailed.
10-6-77	17	Filed Certificate of probable cause to appeal granting petitioner permission to appeal.....Goettel, J.
10-7-77	18	Filed Corrected Certificate of probable cause to appeal granting petitioner permission to appeal.....Goettel, J.
Oct 18, 1977	19	FILED TRANSCRIPT OF PROCEEDINGS, dated 7-11-77
10-18-77	20	FILED TRANSCRIPT OF PROCEEDINGS, dated 7-21, 22-77
10-18-77	21	FILED TRANSCRIPT OF PROCEEDINGS, dated 8-2, 3-77

B.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BERNARD BERGMAN,

Petitioner,

-against-

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:
77 Civ. 3344 (GLG)
:

THE HONORABLE LOUIS J. LEFKOWITZ,
New York State Attorney General, the
Justices of the Supreme Court of the
State of New York, sitting in New
York County,

Respondents.
-----X

: O P I N I O N
:
:

A P P E A R A N C E S :

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G. O E T T E L , D. J.

Bernard Bergman seeks a writ of habeas corpus staying his surrender to the New York State authorities and vacating a one-year prison sentence.^{1/} A temporary stay granted by this Court was later upheld by the Court of Appeals for the Second Circuit on the understanding that Bergman's petition would be given a prompt hearing.^{2/} A lengthy evidentiary hearing was then conducted.

This case presents difficult issues focusing on a complex plea bargain agreement and the ramifications of Santobello v. New York, 404 U.S. 257 (1971).

During 1973 and 1974 the New York Temporary State Commission on Living Costs initiated an investigation of living conditions in nursing homes. An Office of Special Prosecutor was created in January of 1975 to investigate the widespread abuses uncovered in the related areas of Medicaid fraud and bribery of public officials. One of the early targets of this investigation, and certainly the most publicized, was the petitioner, Bernard Bergman. Parallel and somewhat overlapping Grand Jury investigations were commenced by the Special Prosecutor, Charles J. Hynes, and by the United States Attorney for the Southern District of New York. Only when it became apparent that both

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the state and federal governments were about to indict the petitioner for similar crimes did the two offices enter into a working relationship, including an agreement that the federal and state indictments would be returned and announced on the same day.

In federal court, Bernard Bergman and his son, Stanley, were indicted on eleven counts of income tax evasion. The New York State indictment had ten counts and substantially overlapped the federal charges, raising potential double jeopardy problems if the federal prosecution preceded the State's.

Extended negotiation with both prosecutors ultimately produced a complex plea bargain. While some terms of the bargain were vague, the essential elements were:

1. Bergman would plead guilty to bribing a public official in state court and fully cooperate with the Special Prosecutor in substantiating a corruption case against New York Assemblyman Albert Blumenthal. In return, the Special Prosecutor agreed to dismiss the original state indictments against both Bergmans.

2. In federal court, Bergman alone would plead guilty to the first and third counts of the indictment; and, with

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immaterial exceptions, no other members of the Bergman family would be prosecuted.

3. Bergman would make voluntary restitution of all Medicaid overpayments, the amount to be determined after an examination of pertinent records.^{3/}

4. Bergman and his family would cooperate with respect to testimony and other matters.

5. The prosecutors would not recommend a specific sentence or characterize the crime. The state sentence would be imposed after the federal sentence and, if possible, after Bergman had testified at the Blumenthal trial.

6. At the state sentencing, the Special Prosecutor would make a submission of facts documenting Bergman's activities (which possibly might deflate some of the charges made during the period of legislative investigation), and detailing the extent of Bergman's cooperation.

The parties also agreed that there would be no press statements following the plea; no mention was made of press statements following the sentencing. While certain restrictions were imposed upon prosecutorial statements, the parties agree that these were limited to in-court declarations.

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OPINION OF THE DISTRICT COURT

At a meeting in chambers with Justice Aloysius J. Melia, to whom the state proceeding was then assigned, the parties presented a written proposal committing the Special Prosecutor to recommend no ^{state} sentence in addition to the federal ^{4/} sentence. Justice Melia said that while he would not agree in advance, he normally followed the prosecutor's recommendations ^{5/} on sentencing.

On March 11, 1976, the terms of the plea bargain were entered on the record in state court. In accepting the guilty plea, Justice Melia told the defendant that he had not agreed as yet to accept the Special Prosecutor's recommendation, but that his usual practice was to follow such a recommendation. When the defendant indicated that he understood, the judge repeated his admonition, and the defendant again acknowledged that he fully understood. The guilty plea on the Blumenthal ^{6/} charge was then accepted.

On that same day, in federal court, Bergman's plea of guilty to the two federal charges was accepted by Judge Marvin E. Frankel, and the plea bargain in its entirety was placed on the record.

Shortly after entry of the pleas, a dispute arose over the details of the restitution provision. The Special

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Prosecutor claimed that over two and a half million dollars was due while Bergman's counsel put the sum at several hundred thousand dollars. Additionally, petitioner favored payment at an indefinite time after sentence while the Special Prosecutor pressed for payment prior to sentencing.

A pre-sentence conference was held before Judge Frankel in federal court on June 10, 1976. The Special Prosecutor did not attend. The Assistant United States Attorney relayed the Special Prosecutor's belief that Bergman was not complying fully with the restitution term of the agreement. He expressed concern that early sentencing might destroy Bergman's incentive to make restitution. Judge Frankel learned for the first time of the huge disparity between the amounts each side claimed were due and expressed some skepticism that the Special Prosecutor's figure was accurate. He indicated awareness that the parties wanted his sentence to cover both federal and state charges but noted that this outcome was uncertain since the Special Prosecutor's recommendation was not binding on the state sentencing judge. Consequently, Judge Frankel advised the defendant that should the state judge impose an additional sentence, "I would expect Dr. Bergman to be back here to ask for reconsideration, because I am assuming there will be no additional sentence."

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On June 15, 1976, the parties met with Justice Melia and discussed, inter alia, the still unresolved restitution dispute. Justice Melia indicated that he would not be prepared to sentence until either the differences were actually resolved or machinery for their resolution was established. The delay in state sentencing, which now seemed likely, caused concern to both sides since an implicit, although unwritten, term of the plea bargain agreement was that both sentences would be handed down on the same day.^{7/} The parties returned to federal court for yet another pre-sentence conference where they jointly requested an adjournment of the federal sentencing. Judge Frankel refused, saying that he regarded the problems surrounding restitution to be matters solely of state concern and that he would proceed on the assumption that no additional sentence would be imposed by the state court. The Court was informed that while Justice Melia was not bound by the Special Prosecutor's recommendation, he clearly would not disregard it.^{8/}

The restitution aspects were not the only portion of the plea bargain which had "gone sour" for the Special Prosecutor. In the interim, Justice Melia had dismissed the indictment against Assemblyman Blumenthal. This led Judge Frankel to comment that although his sentence was supposed to consider the New York charge of bribery admitted by Bergman, he did not view that factor as an important one:

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"Well, I tell you frankly; given the dismissal and given the fact that that is in the State Court, though I am assuming this sentence will be the total sentence I am not disposed to give much weight to that Blumenthal situation."

The following day, June 17, 1976, Judge Frankel sentenced Bergman to four months imprisonment. After the sentencing, Bergman read a prepared statement to the press assembled on the courthouse steps to the effect that his innocence had finally been demonstrated.

The attorneys for the parties then went back to state court. Despite the fact that the restitution controversy was still unresolved, Bergman's counsel made a pro forma request that sentencing take place at that time. (Bergman was not present.) Both sides accused the other of having breached their agreement. The Special Prosecutor pointed to defendant's failure to settle on terms for restitution, while Bergman's counsel charged that the amount due had been deliberately inflated for its publicity impact. The Court responded by refusing to sentence at that time, expressing its view that an agreement on restitution was critical to the sentence.^{9/}

Emerging from court, the Special Prosecutor answered some questions posed by waiting reporters and announced that he

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would make a formal press statement in his office later that day. At the conference, Hynes read a prepared statement ^{10/} before the assembled television cameras and radio microphones, stating that he was "extraordinarily disappointed" by the "insubstantial" federal sentence and questioning whether justice had been served. The emotional message made no reference to the plea bargain struck by the Special Prosecutor or its possible impact on the federal sentence. ^{11/}

Public response to the sentence was immediate, substantial and generally adverse. Assemblyman Andrew Stein, the head of the state legislative investigation of nursing homes, had a meeting with Justice Melia on June 28, 1976. Stein, echoing many of the sentiments of the Hynes press statement, urged Justice Melia to impose a substantial jail sentence. All those involved testified that Hynes had not been consulted about this visit and that neither Hynes' views nor his press conference remarks were discussed by Stein and Justice Melia.

The following week the parties again went before Judge Frankel, this time on Bergman's application for a delay in his surrender. The Court granted the stay, stating that it

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would be a "gross injustice" to require defendant to begin serving his sentence while the state plea bargain appeared to be disintegrating. While indicating that he still regarded defendant's possible responsibility for the impasse on restitution to be a matter for the state court, Judge Frankel stated:

" . . . if the State plea bargain becomes a nullity, for any reason, serious questions will arise as to the validity and effectiveness of the essentially inseparable federal plea bargain."

The Court predicted that if that occurred there would be a:

"substantial motion to vacate the guilty plea in this court and vacate the sentence imposed upon that plea. Nobody should begin, or should be made to begin, to serve a prison sentence in circumstances like these."

The parties again appeared in state court on July 2, 1976, joining in a request for an adjournment of the sentencing and reporting that because uncertainty still clouded the restitution issue, the plea bargain might be "null and void." The Court commented that it had received hundreds of letters favorable to Bergman while Assemblyman Stein was calling upon the public to express their views. Justice Melia rescheduled the sentencing for September 14, 1976, cautioning that it would be the last adjournment. He added:

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OPINION OF THE DISTRICT COURT

"I still want to underline that I am not tied to any sentence agreement with anybody. Covertly or otherwise, on the record, off the record, on the record, its been clearly stated. I just want everyone to understand that."

The parties were back in federal court on July 9, 1976. Judge Frankel repeated his warning that should the state plea bargain "blow up", a reinstatement of the federal indictment following withdrawal of the plea might be an option open to the defendant under Santobello.^{12/} Bergman's counsel responded that his client would prefer to go through with the plea agreement "even though conditions have changed" since, despite the increased public pressure, the parties understood that Judge Melia would follow the Special Prosecutor's recommendation absent "new evidence of a substantial kind."^{13/} Judge Frankel appeared less sanguine about the ability to predict the state outcome, saying (of Justice Melia):

"He has said more than once, if the transcripts are accurate, as I assume they are, that he has no such understanding at all, that he is not bound by any recommendation, and I would suppose that is the law. He was not a party to any agreement on the sentence, was he?"

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The Court concluded by advising Bergman and his counsel that, after the state sentence, the defendant would have to decide instantly whether to seek to vacate the guilty plea in federal court or to begin serving his sentence.

On September 13, 1976, the eve of sentencing, a late night negotiating session with Bergman and his family produced an agreement for full restitution of two and a half million dollars (with 8 1/2% interest). Bergman expressed his fear that Judge Melia was going to sentence him to additional time. The following morning, at the sentencing, the Special Prosecutor advised the Court:

"Since both items of the agreement have now been satisfied, I have the obligation to fulfill my commitment under the March 4th agreement and Your Honor would recommend that whatever sentence you impose be a concurrent one with the federal sentence imposed on June 17, 1976." (emphasis added).

He then went on to state that if the restitution agreement was not carried out he might declare the "remaining portion of the plea bargain to be null and void." He concluded by saying, "I made the recommendation that I was required to make." Bergman's counsel objected to this language on the ground that the plea bargain required the Special Prosecutor to recommend that no additional sentence be imposed. Mr. Hynes replied, "That is my recommendation," and the objection was withdrawn.

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After both counsel had addressed the Court, and the defendant had been offered his right of allocution, the Court identified the factors weighed in reaching the sentencing decision, indicating that it had considered the totality of the circumstances, including the nature of the crime committed (official corruption), the parties' written submissions and the probation report. Judge Melia stated that he had repeatedly refused to be bound by the plea bargain.^{14/} He then recounted the difficulties in getting Bergman to agree on the amount and timing of restitution, and the small sum actually paid,^{15/} all of which, in the Court's opinion, demonstrated a lack of good faith.^{16/} The Court then touched on other considerations, such as the defendant's ethics, his lack of remorse, his tendency to blame others for improprieties in his business dealings, and his "consuming interest in the preservation of unearned gains." After indicating that he had weighed the Special Prosecutor's recommendation and the eleventh hour agreement on restitution, the Court sentenced the defendant to one year in jail, consecutive to the federal sentence, "in lieu of imposing a four-year sentence." Bergman's counsel then raised the possibility that withdrawal of the plea would be sought on the grounds that the plea

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agreement had been breached and the charges against Assemblyman Blumenthal had been dismissed. The Court agreed to stay execution of sentence.

The following day the parties were back in federal court before Judge Frankel. Bergman's counsel made it clear that they were "not on any account seeking to withdraw the federal plea," but were seeking a reduction of the federal sentence. They indicated, also, that they would be attacking the state sentence. Judge Frankel said that the Special Prosecutor's press statement might possibly constitute a violation of the plea bargain under Santobello, but that this was a matter ^{17/} for the state courts. The Court concluded that no adjustment of the federal sentence should be given on that ground.

An appeal was taken to the Appellate Division of the New York Supreme Court; one of the grounds was that Hynes' ^{18/} press statement violated the plea bargain. On May 10, 1977, the Appellate Division unanimously affirmed in an unwritten opinion, and New York's highest court, the Court of Appeals, declined review on June 1, 1977. Justice Marshall of the Supreme Court denied Bergman's application for bail pending his petition for certiorari. Thereafter, Justice Melia denied a motion for a reduction in sentence, and Bergman filed his petition for a writ of habeas corpus in this Court.

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Petitioner's Arguments

The grounds upon which the petition rests may be summarized as follows:

1. the Special Prosecutor's press statement violated the plea bargain, thereby warranting relief under Santobello v. New York, 404 U.S. 257 (1971);

2. the Special Prosecutor's sentencing recommendation to Justice Melia was so ineffectively delivered that it constituted a violation of the plea bargain;

3. the Special Prosecutor's opposition to the motion for a reduction of sentence was a separate Santobello violation;

4. even if none of the prosecutor's acts set out above was a distinct violation of the bargain, the combination of those acts warrant relief under Santobello;

5. Santobello notwithstanding, the press statement unconstitutionally affected the fairness of the state sentencing proceeding and, as a result, the sentence should be vacated; and

6. the additional sentence in state court, following upon a federal sentence intended to cover both state and federal charges, was a violation of the Double Jeopardy Clause of the Fifth Amendment.

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Exhaustion of Remedies

Initially, the respondent argues that the entire petition should be rejected for failure to exhaust state remedies. See 28 U.S.C. § 2254. A review of the petitioner's brief in the New York Appellate Division reveals that all of the grounds above were raised in the New York appeal, with the exception of the argument concerning the motion to reduce sentence, which had not occurred at that time, and the double jeopardy claim.^{19/} Since the argument about the motion to reduce sentence is a direct outgrowth of the earlier Santobello claims, it is appropriate to consider it at this time. Exhaustion of state remedies is a doctrine grounded in considerations of comity and is not an absolute jurisdictional barrier. Fay v. Noia, 372 U.S. 391, 415-420 (1962); United States ex rel. Johnson v. Vincent, 507 F.2d 1309, 1312 (2d Cir. 1974), cert. denied, 420 U.S. 994 (1975). Dismissal for failure to exhaust state remedies, relegating the petitioner to the state courts, would merely result in unnecessary and duplicative litigation. The need for prompt decision can outweigh comity considerations, particularly when there has been related litigation completed in the state courts. United States ex rel. Wolfersdorf v. Johnson, 317 F. Supp. 66 (S.D.N.Y. 1970).

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While adjudication of these claims does not intrude upon the prerogatives of the state courts, consideration of the double jeopardy claim would. Picard v. Connor, 404 U.S. 270 (1971); Gates v. Henderson, No. 76-2065 (2d Cir., decided Aug. 19, 1977); Fielding v. LeFevre, 548 F.2d 1102 (2d Cir. 1977). That claim was not briefed or argued in state court, and it is raised tersely, almost as an afterthought, in this proceeding. Consequently, the Court declines to reach the claim of a violation of the Double Jeopardy Clause.

Relief Sought

The petitioner's application of the principles of Santobello to the facts of this case follows a somewhat intricate path. In that case, a defendant pleaded guilty in exchange for the prosecutor's promise to make no sentence recommendation. At the time of sentencing, a new prosecutor, unaware of the agreement, recommended the maximum sentence, which the judge imposed. The Supreme Court held that even an inadvertent breach of a plea bargain by the prosecutor offends due process, since the voluntariness of a plea which is induced by an unfulfilled promise is questionable. Therefore, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello

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v. New York, 404 U.S. at 262. The Court remanded the case to state court for appropriate relief which, under the facts presented, could take one of two forms: permitting the defendant to withdraw his guilty plea or granting specific performance of the agreement by making the required recommendation before a different judge on resentencing.^{20/}

In this case, petitioner has elected to forego the first option given by Santobello. He does not now, nor has he ever, expressed a desire to withdraw the plea. He does, however, argue in favor of an extension of the second choice of specific performance. Petitioner maintains that an impartial resentencing has been rendered impossible by the publicity which followed the first sentencing. Quoting Chief Justice (then Circuit Judge) Burger, petitioner points out that it is impossible to "unring the bell." Miller v. United States, 320 F.2d 767, 775 (D.C. Cir. 1963). Therefore, the argument continues, specific performance under the circumstances of this case entitles petitioner to the desired result of the bargain -- a state sentence equal in length and served concurrently with the already served federal sentence. This relief, of course, goes beyond that promised by the prosecutor. His power was limited to the making of a recommendation, not a guarantee. There is some authority, however, for substituting the desired result in place of the prosecutor's promise, an unusual

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circumstances, where meaningful relief can be afforded in no other way. See, e.g., Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976); Correale v. United States, 479 F.2d 944 (1st Cir. 1973); United States v. Carter, 454 F.2d 426 (4th Cir. 1972), cert. denied, 417 U.S. 933 (1974).

The Mutually Dependent Promises
of the Plea Agreement

Before considering in detail the effect of Santobello and the cases construing it, it is essential to review the unusually complex plea bargain involved in this case.

Under traditional contract principles, the usual plea bargain changes (following the defendant's plea) from a wholly executory contract to one which the defendant has completely and unequivocally performed. Performance by the prosecution is thereafter completed by a simple sentence recommendation. The Bergman plea bargain, in contrast, contained a number of mutually dependent promises with each side expecting cooperation from the other over an extended period of time.

As the facts clearly reveal, mutual dissatisfaction quickly developed. Major bones of contention were Bergman's restitution on the one hand, and Hynes' press statement on the other. In addition, the parties were squabbling over such things as access to Bergman's records and the promised statement by the prosecution of the facts actually disclosed by the investigation a statement which the defense hoped would place into a better perspective the otherwise sensational publicity the case had provoked.^{21/}

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Petitioner takes a curious stance with respect to his alleged lack of performance. He argues that only one provision of the agreement specifically rendered the bargain void for non-performance: ^{22/} the provision requiring cooperation and testimony in the contemplated prosecution of Blumenthal. Therefore, he maintains, since this condition was fulfilled (to the extent possible in light of the dismissal of the charges), there was no excuse for anything less than complete performance by the prosecutor.

Again, translating the argument into contract terms, petitioner appears to be saying that non-performance of all except one of the contract's terms would be immaterial breaches which would not jeopardize his right to return performance. While the language of the agreement could have been improved, the construction placed on it by petitioner is simply untenable. Bergman's performance of all the duties outlined in the agreement was the obvious quid pro quo of the prosecutor's performance.

The major dispute of the parties concerned restitution. The Special Prosecutor claims that the parties mutually agreed that, prior to sentencing, there would be agreement on amount and partial payment. Bergman argues that neither was required prior to sentencing. While complete payment probably

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was not contemplated prior to sentencing, it does appear that Bergman was expected either to agree on amount or to make good faith efforts to reconcile the disparity in claimed amounts. At the first date set for sentencing, the parties were more than two million apart in their restitution figures. Justice Melia found that the Bergmans had been intransigent. Moreover, he concluded that the plea bargain would not be acceptable to the Court without a good faith showing with regard to restitution. From the facts, it is clear that there was sufficient reason for the Court and prosecutor to oppose sentencing Bergman on June 17, 1976. On the adjourned date in July, even Bergman agreed that sentencing should be adjourned again because of a failure to resolve the restitution issue. Consequently, there was adequate support for the Court's finding, at the time of ultimate sentencing in September, that Bergman had failed to demonstrate good faith in making restitution.

Having considered the nature of petitioner's conduct, it is now appropriate to consider his specific criticisms of the Special Prosecutor's performance under the agreement.

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The Press Statement as a Violation
of the Plea Bargain

Petitioner's initial claim is that Hynes' press statement violated the terms of the plea bargain. While the prosecutor did promise to recommend to the state court that no sentence in addition to the federal sentence be imposed, no specific term of the plea agreement was breached by the press statement. The parties had made no agreement, explicit or otherwise, about public statements after sentencing. (This contractual silence may have resulted from their expectation that both the state and federal sentences would be imposed on the same day, in which case there would have been no opportunity for such statements.) Moreover, the absence of such an agreement -- even an implicit one -- is further evidenced by the fact that Bergman and his counsel also felt free to make public statements following the sentencing, and they did so.

It cannot reasonably be argued that Bergman's guilty plea was induced, to any significant degree, by some unstated understanding that the prosecutor would make no public statement about the case. The plea bargain was carefully negotiated and drafted by competent counsel and contained no such term. For this reason, the voluntariness of Bergman's plea and the

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performance of the agreement by Hynes cannot be impugned on this ground. United States v. Podell, 519 F.2d 144 (2d Cir.), cert. denied, 423 U.S. 926 (1975).

Petitioner argues that even if the press statement did not violate the letter of the agreement, it was contrary to its spirit and intent. This contention can best be considered in the context of the part it played in the making of the sentence recommendation, which is the next ground of petitioner to be considered.

The Sentencing Recommendation

There is no doubt that the Special Prosecutor's recommendation of no additional sentence was tepidly offered. It did not literally comply with the plea agreement, in that he made no reference to the voluntary disclosures made by Bergman or the knowledge of the federal judge of such disclosures. On the other hand, Justice Melia by this time was intimately acquainted with the explicit terms of the plea agreement, as well as the considerations leading to the prosecutor's recommendation.

There is authority for the general proposition that the prosecutor must make his plea recommendation, if it was bargained for by the defendant, with "some degree of advocacy." United States v. Brown, 500 F.2d 375, 377 (4th Cir. 1974); see

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OPINION OF THE DISTRICT COURT

United States v. Crusco, 536 F.2d 21 (3d Cir. 1976). Taken in the abstract, and in the ordinary plea bargain situation, these cases might support the granting of the writ in this case. But as discussed above, this was anything but the routine plea bargain case.

Justice Melia had, by the time of sentencing, already been involved in numerous on and off the record discussions with the parties about their plea agreement. For months, he had supervised the continuing arguments of counsel and had shown his impatience with the extended restitution negotiations. He knew from the beginning what the prosecutor's sentence recommendation would be, and the factors considered by the prosecutor in reaching that recommendation.

The effectiveness of the prosecutor's recommendation must be measured by looking at all the circumstances involved in the sentencing proceeding. See United States v. Brown, 500 F.2d at 378-79 (Haynsworth, C.J., dissenting). In Brown, a new prosecutor, when questioned by the judge at the sentencing proceeding, could not explain the reasons for the Government's plea recommendation. The Fourth Circuit held that such lack of preparation constituted ineffective advocacy of the recommendation and remanded for resentencing. (Judge Haynsworth agreed with the majority on the law to be applied in such a situation, but dissented because he felt that questions answered by the

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defense counsel at the sentencing effectively cured the Government's omissions.)

In the instant case, Justice Melia clearly knew the facts and circumstances of the plea agreement. Had the Special Prosecutor attempted a glowing endorsement of the sentence recommendation at that time, after the bitter controversy over restitution, it would have been rank hypocrisy. Moreover, the record clearly discloses that Bergman's counsel were satisfied with the prosecutor's recommendation at that time. They raised a single objection to the wording of his statement and, when that was corrected, they withdrew their objection.

It is not at all clear, as petitioner asserts, that the plea recommendation was valueless. As petitioner himself argues, one of the purposes of the recommendation was to shift the responsibility for what might have been a politically unpopular sentence from the judge to the Special Prosecutor. Had the Court felt that no additional sentence should be served, it was well insulated from any political pressure by the fact that the prosecutor had recommended that very result.

There is an additional reason for rejecting the challenge to the prosecutor's sentence recommendation. Bergman's

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counsel knew, up to and at the sentencing, that they always had the option of moving to withdraw the plea. They now contend that they could not have taken such action since, by pleading, Bergman had incriminated himself on the Blumenthal charges, and there was a possibility that the Grand Jury testimony might not have been suppressed as part of a rescinding of the plea agreement. After extensive briefing, the best that can be said for the relevant New York law on this subject is that it is unsettled. Even so, the motion to withdraw the plea could have been joined with a motion to suppress the Grand Jury testimony, with the explicit notation that the two were mutually dependent, so that unless both were granted neither would be sought. The Bergman forces, apparently for strategic reasons, did not pursue this course.^{23/}

Opposition to the Motion to Reduce Sentence

The third point urged by petitioner is that an independent Santobello violation occurred when the Special Prosecutor opposed his motion before Justice Melia to reduce the state sentence. Petitioner relies on United States v. Ewing, 480 F.2d 1141 (5th Cir. 1973), in which the Government kept its promise not to oppose a probated sentence, but argued against such a result at a hearing on a motion to reduce the

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sentence under Fed. R. Crim. P. 35. The Fifth Circuit remanded, permitting petitioner to resubmit his motion to a different judge without opposition from the Government.

Petitioner erroneously argues that Ewing controls here. His error lies in that the Rule 35 motion for reduction of sentence was addressed to the discretion of that federal court. In this case, the motion in state court was opposed by the prosecutor on jurisdictional grounds. He took the position that any reduction of sentence, following its affirmation by the New York appellate courts, would act as an unwarranted interference with completed judicial proceedings. See People v. Ozarowski, 87 Misc. 2d 607, 385 N.Y.S.2d 727 (Sup. Ct. 1976). In other words, the issue before Justice Melia on that motion was whether petitioner had standing to raise, and the court had jurisdiction to hear, his arguments. As such, the prosecutor's opposition to the motion was not inconsistent with his sentence recommendation, but rather was a legitimate legal argument against the challenge to the sentence in that procedural context.

It is unreasonable to contend that the prosecutor was bound by his plea bargain to concede jurisdiction if, in fact, none existed. Such an action would be tantamount to participating in a fraud upon the court. Where the prosecutor

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does that which he is required to do, an argument that he impliedly agreed not to is frivolous. United States v. Michaelson, 552 F.2d 472, 475 (2d Cir. 1977). Clearly, the prosecutor had a right to defend the independent sentencing decision of the state court, so long as he did not take a factual position different from that which he was required to take in his sentencing recommendation.^{24/}

The Sentencing Judge's Alleged Agreement

Unrelated to the petitioner's claims that the Special Prosecutor breached the plea agreement is his argument that Justice Melia himself violated a commitment not to impose an additional sentence. This claim is simply unsupported by the facts. Justice Melia consistently stated that he would not be bound by the prosecutor's bargain, and that he would make an independent sentencing determination at the appropriate time. New York judges are bound by statute to make such an independent determination under N.Y. Criminal Procedure Law § 390.20[1] (McKinney 1971). Even if Bergman was found to have reasonably relied on such a promise by Justice Melia, the opportunity to withdraw his guilty plea cured any error. United States ex rel. Selikoff v. Commissioner of Correction, 524 F.2d 650 (2d Cir. 1975), cert. denied, 425 U.S. 951 (1976).

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Combined Effect of Prosecutor's Actions

Petitioner's final claim under Santobello is that if none of the single instances of alleged improper conduct by the prosecutor is a Santobello violation, the combination of them all is. ^{25/} This argument has no merit. In fact, when viewed in its entirety, the difficult course of this elaborate plea bargain would seem to be as much the result of the petitioner's actions as those of the Special Prosecutor. A defendant who breaches a plea bargain cannot later rely on it for his benefit. United States v. Boulrier, 359 F. Supp. 165 (E.D.N.Y. 1972), aff'd sub nom. United States v. Nathan, 476 F.2d 456 (2d Cir.), cert. denied, 414 U.S. 823 (1973).

One fact clearly emerged from the hearings on this petition. Mr. Bergman has had competent legal counsel from the inception of the proceedings against him. His attorneys ^{26/} raised all possible constitutional claims at every opportunity. They declined, however, to seek the most appropriate remedy for their Santobello claims: withdrawal of the plea and rescission of the agreement. The picture emerges of a carefully calculated course selected by skilled counsel. In response to a question from this Court during these proceedings, one of Bergman's former counsel acknowledged that the decision was made to ride with the guilty plea in the hope

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that no additional sentence would be imposed, with the alternate strategies of appealing in the state courts any sentence that might be given and petitioning this Court for a writ of habeas corpus if the earlier strategies did not succeed.

Under these circumstances, the voluntariness of Bergman's guilty plea cannot be attacked as induced by any unfulfilled promise by the prosecutor. The ultimate choice not to move to withdraw the plea was made with the assistance of competent counsel, again and again, throughout the period of alleged Santobello violations by the Special Prosecutor.

If the Special Prosecutor's actions breached the agreement, the time to assert this was prior to the passing of sentence. Had Bergman's counsel then sought to withdraw the plea the merits of their position would be much more apparent. They chose, rather, to keep the benefits of the bargain already received (the brief federal sentence), thereby accepting whatever breaches may have occurred.

The Claim of Unconstitutional
Prosecutorial Misconduct

Petitioner further contends that if the prosecutor's press statement was not a Santobello violation, it nevertheless was improper and unconstitutionally prejudicial in affecting the state sentencing proceeding. Hynes' statement attacking

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the federal sentence was clearly and totally unwarranted and improper, but the petitioner has failed to show that it was unconstitutionally prejudicial to a fair sentencing.

Rule 8 of the Criminal Rules of this court prohibits such statements "prior to imposition of sentence." Since sentencing had occurred before Judge Frankel several hours earlier, the statement does not appear to violate that rule. However, the statement is manifestly contrary to state law. Hynes' words clearly reflected on the impending state sentence since he was committed to recommending the same sentence. As such it violated Disciplinary Rule 7-107(E) of the New York Code of Professional Conduct which prohibits prosecutorial statements prior to sentencing that are "reasonably likely to affect the imposition of sentence." N.Y. Jud. Law (McKinney 1975).

The Special Prosecutor attempts to justify his remarks on the basis of his obligation to inform the public, and he suggests that any deterrent of this function might violate his First Amendment rights. Cf. In re Sawyer 360 U.S. 622 (1959). This is not a disciplinary proceeding as in Sawyer, however, and whatever the rule might be in that context, it is clear that such prosecutorial statements in the context of a pending criminal case are improper and can be prejudicial.

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See People v. Ward, 37 App. Div. 2d 174, 323 N.Y.S.2d 316 (1st Dep't 1971). The New York State Bar Association Committee on Ethics has clearly defined the distinction between informing the public and intimidating the judiciary:

"Dignified statements made by a prosecutor to inform the public, in advance, of his general policy regarding sentencing recommendations is not improper per se. However . . . any public statements which are designed to sway or inflame public opinion, to gain political advantage rather than provide education, or to attempt to influence or intimidate the judiciary are clearly improper. EC 7-33; Canon 9. Since it is incumbent upon a prosecutor to insure the impartiality and fairness of judicial proceedings, any public statement regarding sentencing recommendations should note the discretionary role of the judiciary in sentencing procedures."

at 69

N.Y. State Bar J., Opinion No. 420-10/29/75 (43-75)/ (January 27/ 1976).

Even if this Court were to conclude that Mr. Hynes' statement constituted misconduct, however, it does not necessarily follow that petitioner is entitled to the relief he seeks here. Petitioner argues that when a prosecutor commits constitutional error, he has the burden of proving beyond a reasonable doubt that the error did not affect the judgment in any way. See Chapman v. California, 386 U.S. 18, 24 (1967). The fallacy of this argument is that prosecutorial misconduct, in the

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abstract, does not violate the constitutional rights of the defendant unless it has a prejudicial impact on the proceeding, i.e., was the impact so great that defendant was deprived of his right to a fair and orderly proceeding. People v. Brosnan, 32 N.Y.2d 254, 344 N.Y.S.2d 900 (1973); see Murphy v. Florida, 421 U.S. 794 (1975) (claim of prejudicial publicity must be shown by the "actual existence of such an opinion in the mind of the juror." Id. at 800, quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961)).^{28/}

Petitioner argues that the potential for prejudice from publicity was heightened in this case because Justice Melia, like most of the New York State judiciary, was politically selected and would have to stand for election.^{29/} Undoubtedly, elected judges are more subject to the passions of the times, but some argue that this is a desirable situation. See N.Y. Law Journal, Sept. 19, 1977, at 1, col. 2. There is no authority for the proposition that a defendant has a constitutional right to a state judiciary independent from all political pressures. It is assumed, rather, that the judiciary is capable of dispensing dispassionate justice regardless of the type or amounts of pressure put upon it.

Assuming this to be the case, the hearing in this Court showed that Hynes' statement could not have so affected

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the sentencing procedure as to have made it unfair. First, there was the time lapse -- almost three months -- between the statement and the sentencing. Second, Justice Melia testified that he did not specifically remember having heard the statement, although he assumes he read it in the New York Times. Finally, in light of the public furor that followed the federal sentencing, it is apparent that Hynes' voice was lost in the general din.

Petitioner alternatively claims that if Hynes' statement was not unconstitutionally prejudicial, this Court should nonetheless grant the requested relief by fashioning a new "exclusionary rule" to deter such prosecutorial misconduct. Whatever the rationale or abiding strength of that exclusionary rule, cf. Stone v. Powell, 428 U.S. 465 (1976), this Court will not extend the concept to prosecutorial misconduct that does not affect the fairness of the proceeding at issue.^{30/}

Conclusion

Because of the complex nature of the plea bargain at issue in this case, the application of the Santobello principles under the law in this Circuit is a difficult task. If we were to look solely at the majority opinion in Palermo v. Warden, supra, we could conclude that the acts of the Special Prosecutor

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constituted a violation of the plea bargain. (But see the dissenting opinion of Judge Bartels.) However, Palermo is not the only case in this Circuit dealing with this subject. United States v. Podell, 519 F.2d 144 (2d Cir.), cert. denied, 423 U.S. 926 (1975) is much closer to the facts of this case. There, the defendant was not entitled to withdraw his guilty plea, even though a letter sent by the Government to the sentencing judge, prior to sentence, violated the spirit of the plea bargain that the prosecutor would not recommend a jail sentence. The court found that the motivation for the guilty plea rested on considerations other than the promise not to recommend a jail sentence. Here considerations concerning a favorable federal sentence and a possible attack on the state sentence motivated the defendant not to withdraw his guilty plea when he had the opportunity to do so.

Since it is difficult to say precisely how the law of this Circuit applies to this rather complex and novel matter, it might be worthwhile to step back from the legal intricacies and look at the matter in a common sense fashion:

The defendant, quite naturally, wanted only one sentence rather than two. The state court judges refused to agree to such an approach and retained their right and discretion to sentence on the state charges. The prosecutor's

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performance was not all that the defendant had hoped for, and perhaps not all that it should have been, but his conduct was prompted in great part by the actions of the defendant and, in any event, had no material effect upon the Court's sentence.

Undoubtedly, considering the public attention, this was a difficult sentence for Justice Melia. He stated that a number of factors were weighed in determining that a sentence in addition to that given in federal court was warranted. Great stress was placed upon the difficulty encountered in obtaining an acknowledgment by Bergman that he owed \$2,500,000 to the state. He also mentioned the heavy weight given to the nature of the crime involved, the failure of the defendant to admit his culpability, his tendency to blame others for his own actions, and the unfavorable pre-sentence report. Justice Melia considered these factors as he approached one of the most sensitive tasks assigned to a judge -- the decision whether to imprison another human being. It is not the function of this Court to second guess that discretionary decision.

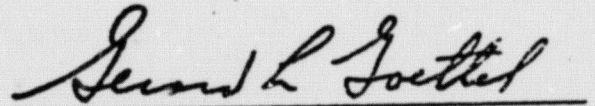
Finally, failing all else, petitioner has requested release on bail pending appeal. Since this is an unusual and difficult case, this Court is prepared to issue a Certificate of Probable Cause for Appeal pursuant to Fed. R. App. P. 22(b)

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upon submission by petitioner. Any application for a further stay of the state sentence or, alternatively, for release on bail pursuant to Fed. R. App. P. 23(b), should be made to the Court of Appeals. The stay previously ordered pending this decision will be continued for five days from the date hereof to allow such application to be made. The petition for a writ of habeas corpus is in all other respects denied.

SO ORDERED:

Dated: New York, N.Y.,
October 4, 1977.


U.S.D.J.

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FOOTNOTES

- 1/ The sentence was imposed by Justice Melia of the Supreme Court, New York County on September 14, 1976 after a plea of guilty to a violation of New York's Public Officers Law § 77 (McKinney Supp. 1977).
- 2/ The need for such an extensive hearing was questionable since, concededly, the essential facts were not in dispute. Petitioner was, nevertheless, afforded an opportunity to present all evidence of any conceivable relevance.
- 3/ There is a dispute as to the meaning of the restitution provision. Its exact wording was:

"Bernard Bergman will pay to the State of New York, voluntarily, without any civil action or litigation of any kind, whatever sums of money are owing to the State of New York from the Towers Nursing Home and any other nursing homes in which he has an interest arising out of Medicaid payments.

This amount shall be determined after consultation and examination of all financial and business records and documents by and between accountants representing the United States, the State of New York, and Bernard Bergman."

- 4/ The case had originally been assigned to Justice Harold Birns. When requested by the parties, he refused to bind himself in advance to adopt the federal sentence as his own. Justice Melia was aware of this earlier refusal so the parties redrafted the provision and submitted the revision to him:

"The Special State Prosecutor will recommend to the Judge of the New York State Supreme Court who will sentence Bernard Bergman on his plea of guilty to making unlawful payments to Albert Blumenthal that, in light of Bernard Bergman having voluntarily disclosed the facts of the crime to the Special Prosecutor and since the Federal Judge will know of these facts when he imposes sentence on the Federal charges, no sentence additional to that imposed by the United States District Court Judge on the federal indictment be imposed here."

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5/ In testifying in this proceeding, Justice Melia explained that he was "not going to buy a pig in a poke," that this was not a simple case, and that he was "not going to tie his hands." He observed that he might be "happy or unhappy with the [federal] sentence."

6/ The exact wording of Justice Melia's statement was:

"Now, I want you to understand this. I have not agreed to accept the recommendation of the Special Prosecutor that no additional time will be imposed on this plea of guilty that you entered before me today.

Now I'm not saying that there will be additional time, and I'm not saying that there will not be additional time. The fact of the matter is that I do not know now. That will depend on future developments. Now do you follow me so far?"

Defendant indicated that he understood and the Court went on to say:

"Now I want you to know also that I told your counsel and the Special Prosecutor that ordinarily I accept the recommendation of the prosecutor for a lesser sentence, and I also told him that I see no reason at this point in time to believe that I would not do so here; however, I want it to be very clear to you that on this plea of guilty you could be sentenced to serve up to four years regardless of what sentence is imposed in the Federal Court."

7/ There were several reasons for this -- one reason was that Bergman's attorney wished to avoid prejudicial publicity between sentencings. The possibility of achieving this turned on the agreement of the courts and the timing of the Blumenthal trial.

8/ The transcript of the proceeding reads that the Court "would disregard it" but it is apparent from the context that this is either a reporter's error or that they meant to say the Court would not disregard it. Transcript at 42.

Judge Frankel stated that he assumed

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OPINION OF THE DISTRICT COURT

"that the sentence imposed by this Court, and particularly if there is a prison sentence, will be the only sentence for the State and Federal pleas.

I am also given to understand that there is no absolute guarantee of that, but it has been indicated to me that especially after the first State indictment that was more or less the expectation on which the parties were proceeding, and I am going to proceed on that basis, leaving aside any monetary things, because I think those are primarily left now, the way this has developed, in the hands of the State Courts and State officials."

9/ Judge Melia added:

"I have specifically stated on the record, acknowledged by counsel and the defendant, that I have no commitment to follow the Special Prosecutor's recommendations.

I said I ordinarily do, and I do, but this, the hands of this Court are not tied; that is not said by way of any threat or indicating any opinion on the part of the Court.

But I just want the record to be clear. I don't want anybody to be lulled into a sense of false security. I made no determination.

But, the people of this state are entitled to two things:

Number one, to know how much money is due and owing to them from these Medicare discrepancies.

Number two, they are entitled to be paid back that money.

Now, I was shocked, chagrined, surprised and displeased when I read in defense memoranda with respect to sentence, an observation that the defense took a dim view of the position taken by the prosecutor, in that there was no time mentioned in the agreement.

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OPINION OF THE DISTRICT COURT

Yesterday, in conference, Mr. Lewin made the same observation, and here again today in court he made the same observation.

I made the observation that I wanted to be clear of all hands, that is, as far as the Court is concerned; there is a time limit.

This matter is going to be resolved one way or the other. It is shocking to me to think that counsel would say that, "Well, sentence will be imposed, and maybe in the year 2010 we will get around to determining how much is due and owing and how much will be paid.

Well, I let counsel know yesterday that that is not going to happen here. That is not going to happen."

10/ This press statement had been prepared by him several days in advance with the assistance of a United States Congressional Aide who had previously served as his press agent. (Hynes had apparently foreseen a short federal sentence.)

11/ "I am extraordinarily disappointed by the sentence that Dr. Bergman received today. One wonders whether essential justice has been accomplished when a man such as Bernard Bergman is given this kind of sentence.

I am deeply troubled and discouraged by the cynicism generated by what the people consider to be a special justice for the privileged.

I am also saddened about what our elderly must think... those who lived in one of Bernard Bergman's nursing homes. I believe they must feel abandoned and alone once again.

As for those destined to spend time in a nursing home in their later years -- one out of every five elderly Americans will do so -- what are they to think?

Our continued investigation into the nursing home industry may, I fear, be adversely affected by this sentence. Concerned citizens, families and employees in nursing homes where stealing and abuse

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is going on today may now think twice before co-operating with my office.

Morris Abram, in his Moreland Commission report to the Governor, prophesied that if vigilance wasn't exercised we could face a repeat of the nursing home scandal in 5 or 10 years.

The sentence handed to Bernard Bergman today does little to belie the fears expressed by Mr. Abram.

New York has done more than any other state to correct its nursing problems: millions of dollars and vast amounts of manpower have been poured into the task of cleaning up the nursing home industry.

If all this money and effort is not to be wasted, then those who have abused the elderly and, in so doing, fashioned for themselves a life of luxury, must learn that they will go to jail for their crimes.

However, insubstantial prison sentences do not deter me. I shall continue to vigorously investigate and prosecute criminals who thrive on abuse of our elderly citizens."

In response to a question, Hynes spoke in the present tense of being "no longer bound by the agreement." We do not know what the question was. All of his other remarks were phrased conditionally -- what he would do if there were no restitution agreement. It is possible, therefore, that the question posed was hypothetical, i.e., what he would do in certain contingencies.

12/ Judge Frankel said:

"Now, look, if there is -- and I tell you with equal candor, it seems to me there may be a possibility that the plea bargain in the State will blow up, then it still seems to me, in principle, that there is plausible ground for moving to vacate the plea here and the sentence of this Court, assuming that that Dr. Bergman and you really mean that you would do that and want to go to trial in both courts which is, of course, your alternative."

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13/ In testifying in this proceeding, Bergman's former lawyer acknowledged that he was attempting to avoid having to take a position on whether the plea should be withdrawn and ultimately decided against it.

14/ In the words of Justice Melia:

"Now, I have agreed to give great consideration to the Special Prosecutor's recommendation pursuant to this agreement with the defense but not to be bound by it.

Now, I made it clear that my determination would be made only at this point and time when all of the facts were before the Court. Now, it is obvious that it would be illegal for the Court to surrender its only responsibility to the Prosecutor. But history and legal tradition impels a court to give a Prosecutor's recommendation for a lesser sentence great weight."

15/ Although at the time of sentence Bergman had promised to pay \$250,000 within 24 hours, no restitution whatsoever was realized for almost half a year.

16/ Bergman argues that the restitution was conceded by the Special Prosecutor to be unrelated to any criminal conduct. Petitioner's Post Hearing Memorandum at 5. That is completely untrue. The Special Prosecutor merely noted that the \$2,500,000 "includes claims for items . . . found to be improperly charged to the state but which have not been found to be chargeable as criminal conduct. . . ." Sentencing Memorandum at 24.

17/ The correctness of this position, in light of the failure at that point to pursue all state remedies, has not been challenged. 28 U.S.C. § 2254.

18/ The Court did not have before it a copy of the actual statement made and declined to accept one, confining itself to the transcribed record on appeal.

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OPINION OF THE DISTRICT COURT

- 19/ The Special Prosecutor contends that some of the matters were not properly raised on the New York appeal because, for example, the full press statement was not a matter of record. As Judge Ward held when sitting in Part I, where he issued the original stay of surrender, the New York courts had an adequate opportunity to pass on the issues. Their failure to render opinions makes it impossible to determine whether their rulings in this case were on the merits or concerned merely what was properly before them on appeal. They did not, however, remand the matter for further proceedings. Consequently, there is no indication that they envisioned the need for further state proceedings.
- 20/ Justice Douglas concurred and joined in the opinion of the Court with the qualification that, in deciding what process was due, a court should give "defendant's preference considerable, if not controlling, weight." 404 U.S. at 267. The three dissenters concluded that breach of a plea bargain directly affects the voluntariness of the plea and, therefore, defendant must be given the option of withdrawing it. Id. at 267-68.
- 21/ The parties apparently agreed that the dispute regarding record access and recommendation were offsetting mutual breaches of agreement. The State did not get the access to records that it desired, and did not make the commendatory statement that was desired of it.
- 22/ Provision 6th reads as follows:
- "Bernard Bergman and Stanley Bergman and their immediate families will be forthright, honest, and completely truthful. This entire agreement will become null and void if, in the good-faith judgment of either the United States Attorney's Office or the Office of the Special State Prosecutor, after a full discussion of the matter with counsel for Bernard Bergman and Stanley Bergman, it is determined that either Stanley Bergman or Bernard Bergman or their immediate families have not been forthright, honest or completely truthful."
- 23/ It is also contended that the prior publicity prohibited a withdrawal of the plea. Undoubtedly the specter of jury prejudice was raised by the massive publicity. It must be kept in mind, however, that the opportunity to

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OPINION OF THE DISTRICT COURT

plead must have been a favorable development for Bergman since he was allowed to plead to only two, less serious, offenses of those charged. After sentencing, Bergman made a statement indicating that the proceedings had vindicated him.

Bergman's counsel also argue that there is no way now to undo the federal jail sentence which has already been served. This is unquestionably true now; but it was not true in September of 1976, when they had a virtual invitation from Judge Frankel to withdraw the plea.

- 24/ Although certain factual arguments were made concerning the continued difficulty of obtaining restitution, these were no more a violation of the plea bargain than were the similar arguments made at the time of state sentencing.
- 25/ There are at least three alleged violations of the plea bargain that are raised for the first time in this court. They include an alleged specific commitment that sentencings would take place on the same day, the claim that Justice Melia had assured the defendant that there would be no additional time, and the argument concerning the need for a statement concerning Bergman's lack of great culpability. Since the Court has determined, factually, that the first was an aim and not a promise, that the second did not occur, and that the third aspect was abandoned by the petitioner when he refused to give full access to his books, it is unnecessary to consider whether these are properly considered for the first time in this Court.
- 26/ Petitioner's Reply Brief at 4. While acknowledging the aid of skilled counsel, Bergman nevertheless argues that only he personally could waive his important right to object to the Special Prosecutor's recommendation. In response, it can only be said that Bergman should not be permitted to stand by his counsel while they pursued their tactics only to "raise [these] constitutional claims in the federal habeas corpus if their initial gamble does not pay off." Wainwright v. Sykes, 97 S. Ct. 2497 (1977).

Even the courts of California which have been most enthusiastic in implementing the Santobello rationale have refused to grant relief where the defendant knowingly foregoes an opportunity to withdraw his plea of guilty. People v. Barajas, 26 Cal. App. 3d 932, 103 Cal. Rptr. 405 (Ct. App. 1972).

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- 27/ See also "The Prosecution Function," ABA Tentative Draft with Amendments (1971) and the ABA Standards Relating to Sentencing Alternatives & Procedures § 5.3(c) (1967).

As one court observed in Snowden v. State, 365 A.2d 321, 325 (Ct. Spec. App. Md. 1976), a prosecutor "might do well to contemplate a reflection of Publilius Syrus in the first century B.C.: 'I have often regretted my speech, never my silence.'"

While the statement may not have been intended to affect the sentencing judge, had sentencing occurred sooner the statement might conceivably have affected sentencing. Moreover, without regard to the state sentence, the remarks reflected unfairly upon a federal judge who was doing his conscientious best to deal with a very difficult sentencing problem complicated by a strange plea agreement struck by the prosecutors.

- 28/ This causation element is a necessary aspect of any claim asserting an unconstitutional prejudicial impact on a judicial proceeding. It is not necessary to make a similar showing in alleging a Santobello violation. Santobello v. New York, 404 U.S. at 262; Palermo v. Warden, Green Haven State Prison, 545 F.2d at 296 & n.13. Thus, the fact that Justice Melia was not influenced by the prosecutor's statement would not defeat the Santobello claim, assuming that there had been a breach of the plea agreement by the Special Prosecutor.

- 29/ Justice Melia was an acting Supreme Court Justice, which is to say that he had been appointed to fill an unexpired term. To continue in the position of Supreme Court Justice he will have to be elected at some future time.

- 30/ The unfairness of the statement rested primarily on the aspersions cast on Judge Frankel and the Special Prosecutor's unwillingness to assume his own responsibility for the outcome. That, however, is not a matter before this court.

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EXCERPTS FROM HEARING TRANSCRIPT

1 THE COURT: Returning to the June 17th press [1227]
2 [1228] statement, you indicated that in your opinion there
3 was a need for a statement regardless of how the federal
4 sentence came out. Was there any discussion with Mr.
5 Hynes about the need for his preserving his own position
6 against public dismay in the event that there was a light
7 sentence?

8 THE WITNESS: Not from me. My point was that
9 Alice was concerned and there was considerable pressure
10 in the office not to issue a statement, lawyers don't
11 want to do that sort of thing, and I took the opposite
12 attack, that this was the singlemost important thing to
13 occur thus far in the entire investigation, which in-
14 volved the State of New York, the complete State, and
15 that Joe had to exercise some kind of presence, he just
16 couldn't stand moot, and we had a classic press relations
17 lawyer-type confrontation.

18 THE COURT: I understand that aspect, but
19 there is the other aspect: This was the special prose-
20 cutor's biggest case and it had been headline news for
21 a long time and as of the conclusion of the federal
22 sentencing on June 17th the special prosecutor had gotten
23 himself in the position of making a plea bargain which
24 had not produced the kind of results that his office
25 had hoped to get, they were not going to get a prosecution

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EXCERPTS FROM HEARING TRANSCRIPT

[1229]

2 of Assemblyman Blumenthal, they had a very light
3 sentence on Mr. Bergman, and they had not gotten acknow-
4 ledgment of what restitution would be made or when it
5 would be made, and all of this could have reflected
6 very unfavorably on the special prosecutor. Do you not
7 agree?

8 THE WITNESS: Yes, I do.

9 THE COURT: So that to a substantial degree
10 there was a motive on his part to make the statement he
11 made to shift the public outcry away from him and toward
12 the sentencing Judge.

13 THE WITNESS: Well, I wouldn't agree with
14 that interpretation. I would agree that one of the
15 purposes in Alice's mind was to keep him from being
16 pilloried. As to shifting it to the sentencing Judge,
17 that was not discussed.

18 THE COURT: Well, in any event, finding a way
19 of getting him out of the griddle?

20 THE WITNESS: I prefer to characterize it
21 as keeping his public image consonant with what it
22 deserved to be, what it ought to be.

23 BY MR. LITMAN:

24 Q And did you therefore help prepare a state-
25 ment for court which would as close as possible approximate

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Minutes of Sentence

It is the one and only count of Indictment 0939/76.

Prior to the imposition of sentence, you, as a matter of law, may address his Honor relative to sentence.

Your attorney, Mr. Newman, may address his Honor. First, an opportunity will be afforded the People to address his Honor.

Mr. Hynes: Have you anything to say relative to sentence?

Mr. Hynes: Yes, sir.

May it please the Court. Six months ago my office entered into a plea agreement with the defendant, Bernard Bergman. For his part, the defendant agreed to two essential items: Cooperation and full restitution. 5

On June 17th I reported to your Honor that although the defendant had cooperated to our satisfaction and one matter which was then and is now the subject of continued litigation, he had been less than candid concerning his knowledge of other areas under investigation.

In addition, I informed the Court that the defendant advised that his liability to the state was less than \$364,000, which our accountants were prepared to document their findings; that at least \$2.5 million—

Your Honor, you adjourned this sentence until July 2nd with the direction to the parties that meetings be held to resolve the differences.

On July 2nd I informed your Honor that the defendant had conceded a liability of \$1.4 million, but that we continued to insist that the liability is \$2.5 million.

It was suggested to your Honor that an outside accounting firm be appointed to resolve the differences, and you agreed, and the matter was postponed until today.

I can report to your Honor today that with respect to cooperation the defendant has substantially complied and continued to comply with that item. Indeed, he has agreed to continue to comply.

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Minutes of Sentence

Since July 2nd there have been more than 30 meetings with the parties. During the earlier meetings, the defendant's liability reached slightly more than \$2 million, and it was at this impasse that the Hon. Peter McQuillan was asked and did appoint an independent accounting firm to arbitrate the amount of payment and the method of payment.

Almost immediately, the defendant agreed to repay \$2.5 million so the arbitrator is left only with the question of the method of payment. I cannot adequately construe to the Court the difficulty and complexity of the undertaking that was questioned by this office to secure the defendant's restitution.

As his Honor is aware, the arbitrator was unable to specifically recommend the course of action. He did however make a suggestion. They advised the defendant be required to post a performance bond to secure full payment to the State of New York, and, failing that, they suggested that my office receive full and absolute control of all the defendant's assets, including a confession of judgment; an assignment of all the defendant's assets, and a security interest to the State of all these assets.

I can report to you now, at the eleventh hour, that the defendant has complied with the terms of those agreements and has in fact signed the confession of judgment, the assignment of his assets, a security interest and further agreement to fully comply with the full repayment of that \$2.5 million.

So, as we stand here today, he has turned over with the signature of his wife also on these documents, he has effectively turned over all his assets to the state in care of my office.

As a further precaution to the repayment of the \$2.5 million, that is that these will be sold off piecemeal, your Honor, by an agent that I will name, in full restitution of

A 52

Minutes of Sentence

the \$2.5 million, with eight and a half percent interest, as it has been accomplished.

Since both items of the agreement have now been satisfied, I have the obligation to fulfill my commitment under the March 4th agreement and, your Honor, would recommend that whatever sentence you impose be a concurrent one with the Federal sentence imposed on June 17, 1976.

Having said this, however, I would like to add a further caveat. The process by which this office secured the agreement of the defendant, the cooperation in making restitution, has been an extraordinarily difficult one, and a complex one.

I will submit to your Honor a partial chronology of the events leading up to this day. Even with the apparent fail-safe method presented to the Court today, by which he turned over his assets to the State, there remains the undeniable possibility that something could occur in the future to force full compliance with the agreement.

I want the Court to know that any judgment—should it come to pass that the State is prevented from recovering the full amount of the money, we say it is owed. And, as a result of that failure or subversion by the defendant I will declare the remaining portion of the plea bargain to be null and void.

For that, I refer to the section of the agreement where the defendant and members of his family are for further prosecution by this office for past misdeeds.

In the event of such occurrence, I would move promptly and vigorously to—

Judge, so that the record is perfectly clear, the defendant is being sentenced before your Honor today for the crime that he pleaded guilty to in the indictment.

It is also considered—it was the consideration of my office before the agreement was entered into that he be required, as a result of the plea, to make full restitution.

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Minutes of Sentence

That is the only thing he is being sentenced for before your Honor, and I made it very, very clear from the outset that it is limited to that charge and it is in recognition that the agreement was complied with by the defendant, both areas, cooperation and restitution.

I made the recommendation that I was required to make.
Thank you.

The Court: Thank you, Mr. Hynes. Mr. Newman?

Mr. Newman: Your Honor, may I just have one minute to consult with co-counsel?

The Court: Yes.

Mr. Newman: If it pleases the Court.

If your Honor pleases, before I address myself to the substance of the normal pre-sentence statement. I must with your indulgence ask through—ask you for a delay in—I must ask you for a clarification on the statement made by Mr. Hynes.

Mr. Hynes, if I understood him correctly, indicated that his obligation as he viewed it under the terms and conditions of the plea agreement was that any sentence imposed by your Honor be concurrent.

I am now looking at Paragraph 4 of the plea agreement, your Honor, and as I read the language and obviously as I construe the language I view for want of a better word perhaps his obligation to be a recommendation that no sentence additional to that imposed by the United States District Court judge on the Federal indictment be posted here.

Mr. Hynes: That is my recommendation.

Mr. Newman: I think you, Mr. Hynes. That makes that question academic to your Honor.

Now if your Honor pleases, pursuant to 390.10 of the Criminal Procedure Law, your Honor afforded us the opportunity to examine the pre-sentence report. I will not call upon your Honor's patience and go through a line by

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Court's Exhibit 1 for Identification

Letter Dated March 4, 1976

[LETTERHEAD OF]

STATE OF NEW YORK
SPECIAL STATE PROSECUTOR FOR HEALTH
AND SOCIAL SERVICES
270 Broadway, New York, N. Y. 10007
(212) 488-2600

March 4, 1976

Nathan Lewin, Esq.
Gustave Newman, Esq.
522 Fifth Avenue
New York, New York 10036

Gentlemen:

This will confirm the agreement that has been made between the Office of the Special State Prosecutor and Bernard Bergman and Stanley Bergman in connection with Indictment 3741/75.

1. Bernard Bergman will plead guilty to counts 1 and 3 of The Federal Indictment, 75 Cr. 785, in the United States District Court for the Southern District of New York.
2. Bernard Bergman will plead guilty to a one count State indictment charging him with making unlawful payments to Albert Blumenthal, in violation of Section 77 of the New York Public Officers Law.
3. Following the sentence of Bernard Bergman on this plea to making unlawful payments to Albert Blumenthal, the State of New York will dismiss Indictment 3741/75 against the defendants Bernard Bergman and Stanley

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Court's Exhibit 1 for Identification

Bergman. It is understood that the Special Prosecutor has agreed to the dismissal of this indictment because (1) the charges to which Bernard Bergman has pleaded guilty in the United States District Court and for which he will be sentenced by a United States District Court Judge are similar to those contained in this State indictment; (2) Bernard Bergman has truthfully admitted his actions and pleaded guilty to the charge of violating Section 77 of the Public Officers Law; and (3) Stanley Bergman's role in the events that are the basis of the charges in this State indictment consists of acts done at the general direction of Bernard Bergman, are relatively of an insubstantial nature and the interests of justice would not be served by further prosecution of Stanley Bergman.

4. The Special State Prosecutor will recommend to the Judge of the New York State Supreme Court who will sentence Bernard Bergman on his plea of guilty to making unlawful payments to Albert Blumenthal that, in light of Bernard Bergman having voluntarily disclosed the facts of the crime to the Special Prosecutor and since the Federal Judge will know of these facts when he imposes sentence on the Federal charges, no sentence additional to that imposed by the United States District Court Judge on the federal indictment be imposed here.

5. Bernard Bergman and Stanley Bergman and members of their families will cooperate with the Office of the Special State Prosecutor and the United States Attorney's Office.

6. Bernard Bergman and Stanley Bergman and their immediate families will be forthright, honest, and completely truthful. This entire agreement will become null and void if, in the good-faith judgment of either the United States Attorney's Office or the Office of the Special State Prosec-

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Court's Exhibit 1 for Identification

cutor, after a full discussion of the matter with counsel for Bernard Bergman and Stanley Bergman, it is determined that either Stanley Bergman or Bernard Bergman or their immediate families have not been forthright, honest or completely truthful.

7. No further criminal prosecution will be brought against Bernard Bergman or his immediate family for any acts occurring prior to the date of this agreement unless such acts involve violence or the sale of narcotics. To this end, Bernard Bergman and his immediate family will be permitted to testify before the Grand Jury without waivers of immunity.

8. Bernard Bergman will pay to the State of New York, voluntarily, without any civil action or litigation of any kind, whatever sums of money are owing to the State of New York from the Towers Nursing Home and any other nursing homes in which he has an interest arising out of Medicaid payments.

This amount shall be determined after consultation and examination of all financial and business records and documents by and between accountants representing the United States, the State of New York, and Bernard Bergman.

9. The sentence of Bernard Bergman on his plea of guilty will take place after the United States District Court Judge has imposed sentence and there is a final judgment of conviction. The parties will seek to have that sentence take place after the termination of all proceedings in which the testimony of Bernard Bergman is required.

10. Consistent with the practice in the Federal Court, the Special Prosecutor and the Federal Prosecutor will not recommend a specific sentence to the Federal Judge or to

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Court's Exhibit 1 for Identification

the Probation Department. However, the Special Prosecutor will make a submission of facts to the Federal Judge and the Probation Department which will set forth all of the testimony and documents relating to the activities of Bernard Bergman that have been revealed by its investigation and will compare this evidence with the factual charges made against Bernard Bergman in 1974 and early 1975. The Special Prosecutor will not make any statement characterizing the crimes to which Bernard Bergman has pleaded guilty. The Special Prosecutor will tell the Federal Judge and Probation Department the nature, extent and value of the cooperation of Bernard Bergman and his family.

Very truly yours,

/s/ CHARLES J. HYNES

CHARLES J. HYNES
Special State Prosecutor

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Court's Exhibit 2 for Identification

Letter Dated March 8, 1976

[LETTERHEAD OF]

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURTHOUSE

FOLEY SQUARE

New York, N. Y. 10007

March 8, 1976

Nathan Lewin, Esq.
2555 M Street, N.W.
Washington, D.C. 20037

Re: United States v. Bernard Bergman
and Stanley Bergman, 75 Cr. 785

Dear Mr. Lewin:

This is to set forth the terms pursuant to which Bernard Bergman has agreed to enter a plea of guilty to Counts One and Three of the indictment above referred to:

1. Bernard Bergman will enter a plea of guilty to Counts One and Three of the indictment, and, following sentencing on said counts, the United States of America will dismiss the remaining counts against him.

2. On the same date or as soon thereafter as practicable, on which Bernard Bergman enters the plea described in paragraph (1), Bernard Bergman will plead guilty in the Supreme Court of the State of New York, New York

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County, to a one-count indictment charging him with a violation of §77 of the New York Public Officers Law. Following the sentence of Bernard Bergman on this plea, the State of New York will dismiss Indictment No. NHM 3-1975 (3741/75) against the defendants Bernard Bergman and Stanley Bergman.

3. At the time of entering the plea referred to in paragraph (1) of this letter, Bernard Bergman will make a statement in open court containing factual admissions responsive to the charges in Counts One and Three.

4. After the date on which the pleas described above are entered, Bernard Bergman and all members of his family will cooperate with the United States and the State of New York.

5. Bernard Bergman and members of his family will be forthright, honest and completely truthful as to any and all questions asked of them and will testify truthfully under penalties of perjury. They will provide any and all documentation needed in relation to such inquiries. This agreement will become null and void if, in the good-faith judgment of the United States Attorney's Office, after a full discussion of the matter with counsel for Bernard Bergman, it is determined that Bernard Bergman has not been forthright or truthful.

6. No further criminal prosecutions will be brought in this District by the United States against Bernard Bergman or his immediate family for any acts occurring prior to the date of this agreement, unless such acts involve violence or the sale of narcotics.

7. The United States and Bernard Bergman will jointly request postponement of sentencing on the pleas

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entered pursuant to paragraph (1) of this Agreement until after the termination of all proceedings in which the testimony of Bernard Bergman is required.

8. At the time of sentence:

a. Pursuant to the usual practice in this District, the United States Attorney will not recommend a sentence to the Court or the U.S. Probation Office. Nor will he make any statement characterizing the seriousness of the crimes to which Bernard Bergman has pleaded guilty.

b. Also pursuant to the usual practice in this District, the United States Attorney will bring to the attention of the sentencing judge and the Probation Office the nature, extent and value of the cooperation of Bernard Bergman and his family, and may submit such additional facts, subject to sub-paragraph c below, as he believes are relevant to determination of a sentence herein.

c. In the submission of facts to be made to the Probation Office and the Court, the United States Attorney and the New York State Special Deputy Attorney General for nursing homes will recite the testimony and documents relating to the activities of Bernard Bergman that have been revealed by their investigations and such submissions will be served on counsel for Bernard Bergman in sufficient time to afford counsel an opportunity to submit a timely response to the Probation Office and to the Court.

If this letter correctly reflects the terms of our understanding, please sign the enclosed copy where indicated,

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secure the signatures of Messrs. Bergman and Newman where indicated, and return the copy to us.

Very truly yours,

ROBERT B. FISKE, Jr.
United States Attorney

By: /s/ MICHAEL B. MUKASEY

MICHAEL B. MUKASEY
Assistant United States Attorney
Telephone: (212) 791-0046

Enclosures

Accepted

Nathan Lewin, Esq.
Attorney for Bernard Bergman

Bernard Bergman

Gustave H. Newman, Esq.
Attorney for Bernard Bergman

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Bergman Given 4 Months

By JOHN L. HISS

Ferrard Bergman, the central figure in the New York nursing-home scandal who had been convicted of Medicaid and tax fraud, was sentenced yesterday to four months in a Federal correction center. The special state prosecutor immediately charged that the promoter had reneged on a plea bargain, and threatened to reopen the prosecution of the Bergman family in state courts.

At a news conference, Charles J. Hynes, the special

Excerpts from Frankel statement, Hynes text, page A24.

prosecutor, said the sentence handed down by Federal Judge Marvin E. Frankel would encourage public cynicism about "special justice for the privileged," discourage the elderly and damage the continuing investigation into nursing-home abuses.

The prosecutor also said that Mr. Bergman had made a "palpably absurd" offer to repay \$367,000 defrauded from Medicaid, although the state's auditors had uncovered thefts totaling \$2.5 million. He indicated that the Bergmans had been less than forthcoming in testifying about political influence in behalf of nursing-home operators.

Judge Frankel, sitting in United States District Court in Foley Square, in New York City, described the four-month

Continued on Page A24, Col 1

BERGMAN DRAWS A 4-MONTH TERM

Continued From Page A1, Col. 7

sentence as a "stern" one that would deter others. In a 3,500 word memorandum that discussed on the theory of sentencing, he declared:

"The criminal behavior . . . is blatant in character and unmitigated by any suggestions of necessitous circumstances or other pressures difficult to resist."

On the other hand, he said, the defendant had had "an illustrious public life and works" and was 64 years old.

"The case calls for a sentence that is more than nominal," the judge said. "Given the other circumstances—including that this is a first offense, by a man no longer young and not perfectly well, where danger of recidivism is not a concern—it verges on cruelty to think of confinement for a term of years."

Judge Frankel ordered Mr. Bergman to surrender on June 28 to begin his term at the new Metropolitan Correction Center, 150 Park Row, but said he would be receptive to a request for a transfer to the Community Training Center in the Bryant Hotel, at Broadway and 54th Street, if the defense preferred that.

Mr. Bergman, who at a hearing on Wednesday appeared a broken man, sat impassively through the proceedings yesterday.

NEW YORK TIMES

In a statement, he said he had been cleared of "the wild and vicious allegations which were made against me in the press," and had been charged only "with misconduct for accounting entries and items on tax returns which were written by an accountant whom I retained and trusted."

At a hearing on June 10, Judge Frankel referred to what he described as "strident" papers submitted by Mr. Hynes about "how many nursing homes Dr. Bergman had or did not have, how well or how poorly people were treated" and "how many, if any, wrongs he committed."

'Futile Enterprise'

"I don't think they're terribly important," he said. "For me to adjudicate [them] would seem to me a futile enterprise."

In his sentencing memorandum yesterday the judge praised Mr. Bergman's past and said he had been "pilloried by journalists."

"The defendant appeared until the last couple of years to be a man of unimpeachably high character, attainments, and distinction," Judge Frankel wrote. "A doctor of divinity and an ordained rabbi, he has been acclaimed by people around the world for his works of public philanthropy, private charity, and leadership in educational enterprises."

"The conspiracy to defraud, as defendant has admitted, is by no means the worst of its kind, it is by no means as flagrant or extensive as has been portrayed in the press; it is evidently less grave than other nursing-home wrongs for which others have been convicted or punished."

"He argues, and it appears to be undisputed, that the media (and people desiring to be featured in the media) have vilified him for many kinds of wrongdoing of which he has in fact been innocent."

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NEW YORK TIMES

Excerpts From Court Statement; Text of Prosecutor's

Following are excerpts from the sentencing memorandum of Federal Judge Marvin E. Frankel and the text of a statement by Charles J. Hynes, special prosecutor for nursing homes:

Judge Frankel

The conspiracy to defraud, as defendant has admitted it, is by no means the worst of its kind; it is by no means as flagrant or extensive as has been portrayed in the press; it is evidently less grave than other nursing home wrongs for which others have been convicted or publicized.

This defendant should not be confined to incapacitate him. He is not dangerous. It is most improbable that he will commit similar, or any, offenses in the future. There is no need for "specific deterrence."

Resisting prison above all else, defense counsel included in their thorough memorandum on sentencing two proposals for what they call a "constructive," and there-

fore a "preferable," form of "behavioral sanction." One is a plan for Dr. Bergman to create and run a program of Jewish vocational and religious high school training. The other is for him to take charge of a "Committee on Holocaust Studies," again concerned with education at the secondary school level.

A third suggestion was made orally at yesterday's sentencing hearing. It was proposed that Dr. Bergman might be ordered to work as a volunteer in some established agency as a visitor and aide to the sick and the otherwise incapacitated. The proposal was that he could read, provide various forms of physical assistance, and otherwise give comfort to afflicted people.

No one can doubt either the worthiness of these proposals or Dr. Bergman's ability to make success of them. But both of the carefully formulated "sanctions" in the memorandum involve work of an honorific nature, not unlike that done in other projects to which the defendant has devoted himself in the past. It is difficult to conceive of them as "punishments" at all. The more recent proposal is somewhat more suitable in character, but it is still an insufficient penalty. The seriousness of the crimes to which Dr. Bergman has plead guilty demands something more than "requiring" him to lend his talents and efforts to further philanthropic enterprises. It remains open to him, of course, to pursue the interesting suggestions later on as a matter of unforced personal choice.

Defendant invokes an un-

derstandable, but somewhat unworkable, notion of "disparity." He says others involved in recent nursing home fraud cases have received relatively light sentences for behavior more culpable than his. He lays special emphasis upon one defendant whose frauds appear indeed to have involved larger amounts and who was sentenced to a maximum of six months' incarceration, to be confined for that time only on week nights, not on weekdays or weekends. This court has examined the minutes of that sentencing proceeding and finds the case distinguishable in material respects. But even if there were a threat of such disparity as defendant warns against, it could not be a major weight on the scales.

How, then, the particular sentence adjudged in this case? As has been mentioned, the case calls for a sentence that is more than nominal. Given the other circumstances, however—including that this is a first offense, by a man no longer young and not perfectly well, where danger of recidivism is not a concern—it verges on cruelty to think of confinement for a term of years.

Mr. Hynes

I am extraordinarily disappointed by the sentence that Dr. Bergman received today. One wonders whether essential justice has been accomplished when a man such as Bernard Bergman is given this kind of sentence.

I am deeply troubled and discouraged by the cynicism generated by what the people consider to be special justice for the privileged.

I am also saddened about

what our elderly must think—those who lived in one of Bernard Bergman's nursing homes. I believe they must feel abandoned and alone once again.

As for those destined to spend time in a nursing home in later years—one out of every five elderly Americans will do so—what are they to think?

Our continued investigation into the nursing home industry may, I fear, be adversely affected by this sentence. Concerned citizens, families and employees in nursing homes where stealing and abuse is going on even today may now think twice before cooperating with this office.

Morris Abram, in his Morland Commission report to the Governor, prophesied that if vigilance wasn't exercised we could face a repeat of the nursing home scandal in five or 10 years.

The sentence handed to Bernard Bergman today does little to belie the fears expressed by Mr. Abram.

New York has done more than any other state to correct its nursing home problems: Millions of dollars and vast amounts of manpower have been poured into the task of cleaning up the nursing home industry.

If all this money and effort is not to be wasted, then those who have abused the elderly and, in so doing, fashioned for themselves a life of luxury, must learn that they will go to jail for their crimes.

However, insubstantial prison sentences do not deter me. I shall continue to vigorously investigate and prosecute criminals who thrive on abuse of our elderly people.

State Prosecutor 'Disappointed'

Bergman State Sentence Stayed; U.S. Court Gives Him 4 Months

NEW YORK LAW JOURNAL

How much time nursing home operator Bernard Bergman will have to serve in prison became doubtful yesterday, following his sentencing to four months in jail in federal court on his plea of guilty to charges of being part of a \$1.2 million Medicaid and tax audit.

Mr. Bergman was to receive a concurrent sentence in state court on his plea of guilty to charges he bribed Assembly Majority Leader Albert Blumenthal to obtain a license for one of his homes. An indictment against Mr. Blumenthal was dismissed and now is on appeal.

However, following the federal sentencing, State Supreme Court Justice Aloysius Mella put off sentencing Mr. Bergman until July 2, stating "my hands aren't tied" and indicating he was disturbed by the "tremendous discrepancy" between what the state and Mr. Bergman say is owed to the former.

Restitution Accord

State charges similar to the federal accusations were to be dropped when Mr. Bergman was sentenced in state court. Mr. Bergman has agreed to pay back to the state only \$350,000 of the \$2.5 million that state auditors say he owes.

Mr. Bergman's sentence in the U.S. District Court for the Southern District of New York by Judge Marvin E. Frankel was criticized by Charles J. Hynes, State Special Prosecutor for nursing homes.

'Extraordinarily Disappointed'

Stating that he was "extraordinarily disappointed," Mr. Hynes attributed the federal sentence to special justice for the privileged. "I am also saddened about what our elderly must think . . . those who lived in one of Bernard Bergman's nursing homes. I believe they must feel abandoned and alone once again," he continued.

After his sentencing in federal court, Mr. Bergman said he was relieved "that this ordeal of more than one-and-a-half-years is over." It is time, he stated, "that the air is cleared and the truth emerges." He denied that any patient of his ever was mistreated or that he ever had been associated with "organized crime."

However, Mr. Hynes, in state court, said Mr. Bergman had refused to live up to his agreement to cooperate in the nursing home investigation and to make full restitution.

Details Sealed

The prosecutor said details of Mr. Bergman's alleged non cooperation were not available because they are contained in a sealed, pre-sentence report to Judge Frankel. Mr. Bergman, however, Mr. Hynes said, did cooperate in his investigation of Mr. Blumenthal.

In imposing sentence, Judge Frankel said he considered the term a "stern" one, considering the non-violent nature of the charges to which Mr. Bergman pleaded guilty last March.

"For people like Dr. Bergman," the judge said, "who might be disposed to engage in similar wrongdoing, it should be sufficiently frightening to serve the maximum of general deterrence."

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EXCERPT FROM PETITIONER'S EXHIBIT 17

hardship to pay more at this time. However, for some years, this money, the property of the taxpayers of this state, has been used by him to accumulate additional assets.

How does the 2.5 million come into the case before me today *of improperly trying to influence a public officer.*

It comes into the picture tangentially as one of the plea negotiation agreements entered into between prosecutor and defense which serves as one of the bases for the Special Prosecutor's making sentence recommendations and *bestowing* *on* other benefits to the defendant.

However, the defendant is entitled to consideration to the extent that the plea-bargain agreement has met compliance. And the Special Prosecutor feels constrained to extend credit to the defendant for the compliance exacted, including an agreement of indebtedness in the amount of 2.5 million, and for the partial payment made and for the promise to pay as outlined in the *Price* *Agreements* *Waterhouse* *report.*

Accordingly, I will give credit in that regard in the imposition of sentence.

Pursuant to the plea negotiation agreement between the Special Prosecutor and the defense, the Special Prosecutor has recommended that this court now impose no jail sentence additional to that fixed by the federal court. He has set forth the reasons for this recommendation.

One of the factors prompting that consideration is that there would have been no such case *without me today* without the defendant's

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